**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

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**JESSICA A. DILLON,**

**Plaintiff/Appellee,**

**vs.**

**STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,**

**Defendant/Appellant.**

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**Supreme Court Case No.: _____**

**Court of Appeals No.: 324902**

**Lower Court No.: 12-10464-NF**
**Isabella County Circuit Court**

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# PLAINTIFF – APPELLEE'S ANSWER TO DEFENDNAT'S – APPELLANT'S REQUEST FOR LEAVE TO APPEAL

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## COUNTER STATEMENT OF QUESTIONS PRESENTED

I. DOES THE WRITTEN NOTICE OF INJURY IN THIS MATTER SATISFY MCL 500.3145(1) AND ALLOW PLAINTIFF TO RECOVER PERSONAL PROTECTION INSURANCE BENEFITS FOR ANY LOSS INCURED WITHIN ONE YEAR OF THE COMMENCEMENT OF THE ACTION?

CIRCUIT COURT ANSWERED YES.

COURT OF APPEALS ANSWERED YES.

PLAINTIFF-APPELLEE ANSWERED YES.

DEFENDANT-APPELLANT ANSWERED NO.

## INTRODUCTION AND REASONS AGAINST GRANTING LEAVE TO APPEAL

The Defendant, State Farm, in its Application for Leave completely misrepresents the Court of Appeal's Published Decision and the facts of the underlying case. In the very first sentence Defendant argues that the Court of Appeals held that the Plaintiff could satisfy the written notice provision of a statute of limitations by providing oral notice. The trial court, relying on *Walden v. Auto Owners Ins Co* 105 Mich App 528 (1981), found in its opinion that the Plaintiff had provided written notice to the Defendant of injury when the Defendant transcribed a detailed note regarding the accident and her reported injuries in the claim file. The Defendant never directly challenged that finding in the Court of Appeals. The Defendant claims in footnote 5 of its Application that this argument was preserved below. However, nothing in its appellate brief would lead one to believe that this was an issue on appeal. No argument was made that directly challenged the trial court's finding with regards to written notice. To the extent the issue was raised it was given only cursory discussion by Defendant. As such this Court would be well within their discretion to treat the issue as abandoned. *Vanderwerp v. Plainfield Charter*, 278 Mich App 624, 633 (2008).

Defendant, is now leading with the argument that the original notice was defective because it was only oral and not written. (Defendants App. for Leave, Argument Section II. B.) Previously, Defendant focused on the argument that since they had only received notice of the back and shoulder injuries but not of the hip injury within one year from the accident no benefits were owed for the hip injury. Now they seem to be arguing no benefits are allowed whatsoever for any injuries.

Presumably the reason there was no elaborate discussion regarding whether there was written notice in the Court of Appeals opinion is because the trial court ruled that there was written notice and State Farm never seriously challenged that finding. Certainly if they disagreed with the trial court they could have raised that argument in their appeal to the Court of Appeals.

In addition, the Defendant confuses the facts of the case indicating that the only notice provided was a voicemail left with State Farm. This is incorrect, the claim originally was reported by the agent and then there was a phone call between the mother of the Plaintiff and State Farm in which information was exchanged and claim notes memorializing the call were recorded. (Exhibit 2 of Plaintiff's COA Brief). In addition, there was correspondence exchanged between the Plaintiff and the Defendant and a file was opened. (Exhibit 3 and 4 Plaintiff's COA Brief).

To grant a request for leave to simply allow Defendant to raise new arguments on incorrect factual assertions does not satisfy their burden under MCR 7.305.[1] The Court of Appeals analysis regarding the plain text of the statute in question is in line, to the extent it is even applicable, with this Court's opinion in *Jesperson v. Auto Club Insurance Association*, 499 Mich 29 (2016). No additional review is required.

The real issue in this case is whether Plaintiff's notice was sufficient because it did not identify the hip as an injury. The trial court and the Court of Appeals

[1] Defendant also argues that it is undisputed that no benefits were ever paid. This is not accurate either. As discussed below Defendant's own claim file and adjustor dispute this. Both suggest that benefits were paid related to the back and shoulder injuries.

following the plain text of the statue came to the only logical conclusion they could and found that it did.

## I. COUNTER STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

### A. Procedural Background

This matter proceeded to Trial on July 14, 2014. It was part of a consolidated case involving two separate motor vehicle accidents that the Plaintiff had been involved in. The jury found that Ms. Dillon originally suffered a torn hip labrum as a result of the motor vehicle accident of August 22, 2008. The jury also found that the Plaintiff suffered an aggravation of her original injury of the hip in a subsequent motor vehicle accident, which occurred on April 5, 2012 following her surgery. In addition, this matter involved an uninsured motorist claim arising out of the second accident, which the jury rendered a verdict in favor of Plaintiff for her conscious pain and suffering. (Exhibit No. 1 of Plaintiff's COA Brief). The only issue on appeal dealt with the first-party claim arising out of the initial auto accident of August 22, 2008. Defendant-Appellant did not challeng the verdict relative to the 2012 accident, nor the uninsured motorist claim.

In its appeal, State Farm challenged whether or not the notice of injury provided by the Plaintiff was a sufficient for purposes of MCL 500.3145 to allow benefits for the hip injury. The Court of Appeals, after reviewing the specific language of the statute, agreed with the Plaintiff that notice of injury was all that was required under MCL 500.3145. The Court held that if the legislature had intended the notice to identify a specific injury, then the statute should have provided that notice of "the" injury must be given. Slip Op. at page 3.

The Court determined that because Ms. Dillon gave notice of injury within one year of the accident the statute allowed her to recover benefits for any loss incurred within one year of the filing of suit. Slip Op. at page 4.

**B. Factual Background**

On August 22, 2008, Jessica and her roommate were walking on the campus of CMU a few days in advance of the start of classes. Jessica was in a crosswalk and a vehicle driven by a professor entered the crosswalk and struck her. Her roommate was also hit.

An ambulance was called and she was taken to the emergency department of Central Michigan Community Hospital (now McLaren-Central Michigan). She was struck on the left side of her body. She was thrown high in the air. At Central Michigan Community Hospital the emergency room records indicate that she was complaining of shoulder pain, upper and lower back pain. Diagnostic studies were ordered. Fractures were ruled out. She was released.

At the time of the motor vehicle accident she was an "*insured*" under her father's insurance policy through State Farm.

On September 16, 2008, Jessica's mother reported the facts of loss to her State Farm agent. The State Farm agent, according to the testimony of Denise Pierce State Farm's assigned adjuster, filed a report of the claim on same the day. (Trial Transcript, Volume IV, page 33).

The State Farm claims file reflects that the specific injury complaints were road rash, injuries to the left shoulder, and lower back. These were provided by phone call from

Plaintiff's mother and memorialized in writing by the adjuster on September 19, 2008 (Exhibit No. 2 of Plaintiff's COA Brief).

In addition Ms. Pierce wrote in the State Farm claims file:

> "*RR (resident relative) daughter, she is away at school. Was walking across the street on Central Michigan's campus. Struck by a vehicle. Ended up on the hood of car and then thrown to ground. Mechanism of injury was blunt trauma, pedestrian versus auto*." (Denise Pierce - Dep. 21).

State Farm opened a file and sent a letter to Jessica Dillon on September 22, 2008 confirming the same (Exhibit No. 3 of Plaintiff's COA Brief). The letter from State Farm specifically stated: "*We have received your claim*." In addition, the letter included a medical authorization and directed Ms. Dillon to return it if she would be making a PIP claim. Ms. Dillon executed the authorization on September 27, 2008 and returned it to State Farm. (Exhibit No. 4 of Plaintiff's COA Brief). The letter also indicated that the policy was a coordinated policy and therefore if the Dillons had other health insurance, they should submit their medical expenses to those insurance companies first.

At the time of the 2008 motor vehicle accident, Jessica was also covered under her father's health insurance policy with UMR (Cofinity Health Insurance). (Trial Transcript, Volume IV, page 167 and Jessica Dillon – Dep. 7,8). UMR is an ERISA self-insured employee health insurance plan with a valid coordination of benefits provision. As noted above State Farm took the position that State Farm was not primary and that UMR was. Therefore State Farm did not pay benefits as a primary provider would be expected to do.

According to Ms. Pierce's deposition testimony, State Farm did pay initially for claims relative to her shoulder and back injury. (Denise Pierce Dep. 14, 15). The claim log also makes reference to payment and pursuing subrogation. (Exhibit No. 2 of Plaintiff's COA

Brief). State Farm closed the claim after not receiving any further bills from the Dillons who were, as instructed, sending their bills to UMR.

Jessica Dillon testified at the time of the Trial and at her deposition that after the motor vehicle accident she was sore all over. (Trial Transcript, Volume III, pp. 11-13 and Jessica Dillon - Dep. 28, 29). In particular her entire left side was more painful because it was her left side of the body that struck the vehicle at impact. She landed on top of the car. (Trial Transcript, Volume III, pp. 11-13 and Jessica Dillon - Dep. 29).

Throughout the remainder of 2008 and 2009, Jessica's pain was primarily localized to the shoulder and back and to a lesser extent she was experiencing pain in the left hip. (Trial Transcript, Volume III, pp. 15-17 and Jessica Dillon – Dep. 33, 34). She described the left hip pain as low grade compared to the shoulder and it gradually got worse over time. (Trial Transcript, Volume III, p. 19 and Jessica Dillon – Dep. 34).

While Jessica was leading a relatively normal life throughout 2009 and 2010, the hip pain was always there it and gradually worsened over time. (Trial Transcript, Volume III, p. 19 and Jessica Dillon – Dep. 41). As a result her family doctor, Dr. Lutz, prescribed physical therapy. Physical therapy did not help and the hip pain worsened. As a result a specialist opinion was sought.

On January 26, 2012, Jessica was referred to Dr. Michael Austin, an orthopedic surgeon in East Lansing. Dr. Austin's initial evaluation (Exhibit No. 5 of Plaintiff's COA Brief) focused on her hips and his examination was positive showing impingement, which justified the recommendation that she undergo an MR arthrogram to evaluate the left hip. His findings on January 26, 2012 led him to a tentative opinion (which became a firm

opinion later on) that: "*I am concerned about a labral tear on a traumatic basis*." (Exhibit No. 5 of Plaintiff's COA Brief).

On February 3, 2012, Jessica underwent a left hip arthrogram to evaluate for the possibility of a labral tear. The arthrogram was positive as read by the radiologist showing "*left anterosuperior quadrant labral tear/detachment*." (Exhibit No. 6 of Plaintiff's COA Brief).

Jessica's first follow-up with Dr. Austin post arthrogram was on March 5, 2012 where Dr. Austin also read the MR arthrogram and agreed that it showed a labral tear. At that time he was of the opinion that: "*I think this is probably traumatic in origin. I will have a stronger opinion on that after the surgery*." (Exhibit No. 7 of Plaintiff's COA Brief).

On February 27, 2012, a few weeks after Jessica first saw Dr. Austin and had the MR arthrogram which confirmed Dr. Austin's suspicion of a torn hip labrum, Jessica's mother notified State Farm of the left hip treatment and likely surgery. (Denise Pierce – Dep. 20). State Farm had already closed their claim file as of October 8, 2008 because they had not received any additional medical bills. However, at that time, the Dillons were instructed again to submit their bills to their health insurance company (UMR) because State Farm's position was that UMR was primary, a position State Farm later admitted was wrong. (Denise Pierce – Dep. 31 – 33).

At Trial Jessica's father, James Dillon testified that they had previously followed State Farm's instructions and allowed his UMR insurance to process the medical expenses. (Trial Transcript, Volume IV, page 167-169). Mr. Dillon also testified that once he knew that Jessica was going to require surgery, he advised Jessica's mother to contact State Farm. According to his testimony he was concerned at that point that UMR would not cover all of

the expenses given his deductible. (Trial Transcript, Volume IV, page 167-169). Prior to the surgery Mr. Dillon either paid out-of-pocket for Jessica's treatment or the bills were paid by UMR without objection. (Trial Transcript, Volume IV, page 167-169). However, after the surgery for the first time UMR, based on Dr. Austin identifying the torn hip labrum as being traumatic, denied the claim.

When Jessica's mother, Julie Dillon, notified State Farm that Jessica had been diagnosed with a labral tear of the left hip and that surgery was being scheduled for March 6, 2012, she assumed State Farm would only need to confirm that the labral tear arose out of the 2008 motor vehicle accident. The Dillons assumed that Dr. Austin would be contacted if State Farm had any doubt about the connection.

On March 7, 2012, Jessica underwent surgery at McLaren – Orthopedic Hospital in Lansing by Dr. Michael Austin. The post-operative diagnosis confirmed not only the presence of a labral tear in the left hip but also a partial tear of surrounding ligament. Dr. Austin's operative report specifically notes: "*The ligamentum teres was overgrown, compatible with scarring from a partial or complete tear and some time in the past.*" (Exhibit No. 8 of Plaintiff's COA Brief).

Dr. Austin testified at the time of Trial that in his opinion the torn hip labrum was traumatic in nature and related to the motor vehicle accident of August 22, 2008. (Trial Transcript, Volume III, page 140, 164). The doctor also testified at the time of Trial that there was nothing unusual about the gradual onset of her symptoms given that the accident was in 2008 and that she didn't experience symptoms until much later, ultimately having surgery in 2012. (Trial Transcript, Volume III, page 166).

Shortly after Jessica's surgery, the Dillons were notified by State Farm that they were denying all no-fault benefits related to the left hip not because they believed they were secondary or that the left hip treatment did not arise out of the motor vehicle accident, but **solely** on the basis that they had not received notice of "the" specific injury to the left hip within one year of the date of accident relying upon MCL 500.3145. State Farm claims representative Jessica Wade, a subsequent State Farm adjuster, testified in her deposition on September 3, 2013 as follows:

> *"Q And I guess, you know, not to beat a dead horse, the basis of State Farm's position denying the left hip in this case in the 2008 motor vehicle accident is based soley upon 3145, is that correct?*
>
> *A Yes."*
> (Jessica Wade – Dep. 18)

After the denial the Dillons contacted counsel. It was determined that State Farm should have been the priority carrier from the beginning. UMR was a self-insured ERISA plan with a valid coordination of benefits clause that federal law allowed to preempt the no-fault statutes otherwise valid coordination requirements. State Farm agreed they should have been primary and the original bills in 2008 should have been paid directly by State Farm.

Notwithstanding the priority issue, State Farm continued to maintain their denial of medical expenses related to treatment of the left hip **solely** on the argument that MCL 500.3145 required this young lady to give notice within one year of the date of accident each and every conceivable injury caused by the accident whether she knew of the connection or not.

## II. STANDARD OF REVIEW

Plaintiff-Appellee generally accepts the Standard of Review as stated by the Defendant-Appellant.

## III. ARGUMENT

### A. Plaintiff Provided The Appropriate Notice Of Injury As Required By MCL 3145(1).

### 1. Overview of MCL 500.3145 and its role in this case.

MCL 500.3145 states:

"*500.3145 – Limitations of Actions for Recovery of Personal or Property Protection Benefits: Notice of Injury.*

*Sec. 3145.*

(1) *An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than one year after the date of the accident causing the injury unless written notice* ***of injury*** *as provided herein has been given to the insurer within one year after the accident…"* (Emphasis supplied).

It wasn't until October 2012, after Jessica had incurred considerable medical expenses involving the operative procedure, the hospitalization, anesthesia, radiology, and physical therapy that State Farm notified the Dillons that they were denying the claim based **solely** on MCL 500.3145. (Denise Pierce – Dep. 46, 47); (Jessica Wade – Dep. 18).

The State Farm claims file contains copies of the "*Explanation of Review"* letters showing that when billing statements were provided to State Farm for treatment related to the hip surgery, State Farm would deny them and provide an explanation that: "*Notice of the injury or claim was not provided within one year as required by MCL 500.3145*." (Exhibit No. 9 of Plaintiff's COA Brief).

On October 17, 2012, State Farm was notified by Plaintiff's counsel that State Farm should reconsider their denial in that MCL 500.3145(1) does not, as State Farm claimed, require notice within one year of every conceivable injury arising out of the motor vehicle accident because often the specific cause of certain injuries is not manifested within one year. It was also acknowledged to State Farm that Plaintiff would still have to satisfy the "*Arising out of*" language of MCL 500.3105 for the injury to be compensable, but that did not appear to be the basis of State Farm's denial. In fact, more recently Denise Pierce in her deposition testimony admitted that during the time she handled the claim, there was no reason she had to question whether the left hip injury arose out of the 2008 motor vehicle accident. (Denise Pierce – Dep. 46, 47, 48). It was made clear to State Farm that denial based on MCL 500.3145 was misplaced because the statute only required written notice "*of injury*" and not "*the injury*" as State Farm was adding to the statutory language. There was no dispute with State Farm that the Dillons had given notice within one year "*of injury*" pursuant to the statute and in fact, as noted above, State Farm did pay some medical expenses relating to the shoulder and back.

On September 14, 2012, Plaintiff's State Farm claims file was transferred from Denise Pierce to Jessica Wade for handling. Ms. Wade asked Plaintiff's counsel for specific legal authority in support of Plaintiff's position that State Farm was wrong in their denial of benefits based upon MCL 500.3145.

On November 29, 2012, State Farm was sent a letter by Plaintiff's counsel which appears in the State Farm claims file and was acknowledged as received and reviewed by claims representative Jessica Wade at her deposition on September 3, 2013. (Jessica Wade – Dep. 45, 46, 47). It was also identified as received in the activity log, which is part of State

Farm's claim file, which was marked as exhibit at the deposition of Denise Pierce. Plaintiff's letter is attached here and marked as (Exhibit No. 10 of Plaintiff's COA Brief).

In (Exhibit No. 10 of Plaintiff's COA Brief), Plaintiff's counsel laid out the legal support and authority to the State Farm claims representative, Jessica Wade, citing legal precedent as well as the terms of Plaintiff's insurance contract written by State Farm. Plaintiff continues to rely upon such legal authority and the terms of her insurance policy written by State Farm and, as such, reproduces the November 29, 2012 letter addressed to claims representative Jessica Wade, in its entirety:

"November 29, 2012

Ms. Jessica Wade
Claim Representative
State Farm Mutual Insurance
P.O. Box 661023
Dallas, TX 75266-1023

**RE: Jessica Dillon**
**Our File: 12-085**
**Your Ins: James Dillon**
**Your Claim No.: 22-123H-609**
**Dates of Loss: 8/22/2008 and 4/5/2012**

Dear Ms. Wade:

Thank you for your letter of November 6, 2012 regarding the issue you and I have discussed whether State Farm must be given notice of a specific injury within one year.

In your November 6, 2012 letter, which was in response to my earlier letter of October 17, 2012, you asked me for legal authority in support of the position I took in my letter of October 17, 2012.

In the fact pattern of our particular case, I believe we both agree that State Farm had notice of injury within one year of the August 22, 2008 motor vehicle accident and therefore the notice requirement found in MCL 500.3145(1) was met.

From your letter of November 6, 2012, I believe State Farm's denial of medical claims related to treatment of the hip is based upon State Farm not being specifically notified of the injury to the left hip until a telephone call March 1, 2012. (Please refer to your letter November 6, 2012 – first paragraph).

The telephone call you reference in your letter was just a few days before she underwent hip surgery on March 7, 2012. I believe that accurately reflects the background that leads us to the current disagreement. If I am wrong regarding the background underlying our dispute, would you please let me know.

Assuming I am correct about the background, I, again, would rely upon my letter dated October 17, 2012. However, in addition to that letter, I would specifically refer you to *Walden v Auto-Owners Ins. Co.*, 105 Mich App 528 (1981). In the *Walden* case, the notification to the insurance company described the time and place of the accident, but not



the specific injuries. In fact, the notice form used to indicate injuries was left blank. The Court of Appeals ruled that the deficiency in the lack of notice of specific injuries does not preclude recovery for those medical expenses.

In *Lansing General Hospital Osteopathic v Gomez*, 114 Mich App 814 (1982), the Michigan Court of Appeals also determined that notice was adequate even though the nature of the injuries was not identified. The *Gomez* court cited the *15,* court in its decision.

Beyond these two cases there is even a more compelling reason State Farm's position as addressed in your letter dated November 6, 2012, is in error. State Farm's insurance policy is a contract. The insurance contract itself defeats its position that the claimant, Jessica Dillon, must give notice of each particular injury within one year of the accident. The State Farm car policy booklet under the title "**Insured's Duties"** states:

"*6. Other Duties Under Personal Injury Protection Coverage…*

*A person making claim under:*

*a. Personal Injury Protection Coverage… must:*

(1) ***notify us*** *of the claim and give us all the details about the death, injury, treatment, and other information that we may need* ***as soon as reasonably possible after the injured insured is first examined or treated for the injury***."

(See attached facsimile of "*State Farm Car Policy Booklet – Michigan Policy Form 9822A*" – the relevant pages).

Enclosed is a copy of the records of orthopedic surgeon Dr. Michael Austin. A review of those records indicate that Jessica saw Dr. Austin for the first time on January 26, 2012. Dr. Austin is the first specialist (orthopedic surgeon) that she had seen for hip pain after the August 22, 2008 motor vehicle accident.

Dr. Austin's records indicate quite clearly that March 5, 2012 was the first time Jessica and her parents were advised by Dr. Austin that it was his opinion that an MRI of her left hip showed a labral tear and, more importantly, Dr. Austin said: "**I think is probably traumatic in origin**." That March 5, 2012 office note would be the first occasion that Jessica would have become aware that the left hip pain she had been

experiencing which, as Dr. Austin's note of January 26, 2012 indicates, was not readily apparent but seemed to come on with time, actually related to the original injury when she was struck as a pedestrian in 2008.

As such, State Farm was notified in early March, as you indicate in your letter to me of November 6, 2012. Jessica fully complied with the "**Insured's Duties**" (See attached State Farm Car Policy Booklet) requirement 6a(1) **"...as soon as reasonably possible after the injured insured is first examined or treated for the injury**." Before Dr. Austin's opinion of March 5, 2012, Jessica had not been definitively diagnosed by a specialist that her left hip pain was from the trauma of the car/pedestrian accident in 2008.

Therefore, I believe this additional information is important and I hope that it will allow you to consider payment of the medical expenses previously submitted to State Farm for Review.

The outstanding medical expenses at issue relating to the August 22, 2008 accident had been sent with an accounting to Denise Pierce at State Farm under our cover letter dated August 14, 2012 so it should be found within the State Farm Claims file. Again, at that time the bills were attached. However, I am enclosing a copy of the letter, the summary and copies of the billing statements for your convenience. At that time the bills totalled $31,263.80.

Of the medical expenses in that accounting referenced above, the oldest date of service is December 20, 2011 in the amount of $60.00 and the medical provider was Dr. Troy Henrie. Also, Jessica began physical therapy at Mountain Town Rehabilitation on that same December 20, 2011 date.

I am cognizant of the One Year Back Rule, which would come into play on December 20, 2012 at the earliest. Therefore, I would like to try and get this issue resolved with you before it would be necessary to file suit prior to December 20, 2012.

I am hopeful we can reach an agreement. I look forward to hearing from you.

Very truly yours,

**GRAY, SOWLE & IACCO, P.C.**

Daniel A. Iacco

DAI/pl
Enclosure
cc: Jessica Dillon; Julie Dillon; James Dillon"

State Farm despite the above referenced authority refused to provide benefits, claiming that because they did not have notice of "the" hip injury benefits would not be paid. Interestingly, they never indicated that they did not have notice of injury.

**2. Plaintiff's compliance with the notice requirement of MCL 500.3145(1)**

In addressing MCL 500.3145(1) the Court of Appeals in *Dozier v State Farm Mutual Automobile Insurance Company*, 95 Mich App 121 (1980), noted that Section 3145 contained both a statute of limitations and a notice provision. The court went on to discuss the difference between notice provisions and statutes of limitations: "*notice provisions are designed inter alia, to provide time to investigate and to appropriate funds for settlement purposes*." Citing *Davis v Farmers Insurance Group*, 86 Mich App (1978). The *Dozier* court went on to say:

> "*In light of these objectives, and the existence in a single statutory provision of both a notice provision and a limitations of action provision, we conclude that substantial compliance with the written notice provision which does in fact apprise the insurer of the need to investigate and to determine the amount of possible liability of the insurer's fund is sufficient compliance under Section 3145(1)." Dozier* at 128.

Since *Dozier*, Courts in Michigan, as referenced above, have determined that strict, technical compliance with the requirement of written notice under MCL 500.3145(1) run counter to the legislature's intent to provide the insured with prompt and adequate compensation for personal injuries from automobile accidents, as in *Lansing General Hospital Osteopathic v Gomez* and *Walden v Auto-Owners Insurance Company* cases.[2] Ms.

[2] Defendant suggests in the footnotes of its brief that this Court should look to the notice requirements in road commission cases for guidance. Plaintiff would respectfully submit that the notice required in a road commission case serves a much different purpose (i.e

Dillon gave timely notice in 2008 when State Farm Insurance, received notice from its agent of the accident, took the telephone call from Jessica's mother indicating that Jessica had been in a motor vehicle accident, and had injured her low back and shoulder and recorded those statements in writing in the file. State Farm, as indicated in its September 22, 2008 letter "received" the claim and opened a claims. Furthermore, Jessica Dillon signed and returned an authorization pursuant to their request to indicate her desire to make a PIP claim.

The court in *Dozier* also noted that the notice provision is for the protection of the insurer and accordingly, the insurer can waive the adequacy of the notice. *Id* at page 130. In *Dozier* the court held that by the insurance company acknowledging the written letter from the Plaintiff in that case rather requesting additional information or sending a denial letter, the insurance company had waived its right to assert the insufficiency of the notice. *Id.* In this case, the facts are very similar in that not only did State Farm acknowledge the claim, (Exhibit 2 of Plaintiff's COA Brief) they actually paid claims. At no time did they ever indicate to the Plaintiff that without additional information they were unable to appropriately evaluate the claim. So while Plaintiff argues that its notice was sufficient in this matter, she would further argue would that based on *Dozier*, the Defendant has waived any argument that the notice was insufficient by its original acceptance of the claim. If the Defendant felt there was additional information they needed, they certainly could have requested it well within the first year from the date of the accident.

State Farm's contract language further buttresses the argument that the notice provided in this case was sufficient and in compliance with Section 3145.

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notice of impending litigation) than notice of a private individuals claim for contractual health insurance benefits.

The insurance contract specifically addresses the duties of the insured as far as Plaintiff's duties are concerned in terms of specifically notifying State Farm of *"...all the details about the ...injury... and other information that we may need as soon as reasonably possible after the injured insured is first examined or treated for the injury*." (Exhibit No. 11 of Plaintiff's COA Brief). So not only does State Farm's argument fly in the face of Section 3145, it is contrary to State Farm's own contract language. The policy only requires that information be provided as soon as reasonably possible after treatment for the injury. Neither the contract nor Section 3145 require that the insured must give notice of <u>each particular injury</u> within one year of the accident.

Furthermore, it cannot be seriously argued that the Plaintiff did not comply with the policy language. First the policy cannot be interpreted to place any additional requirements than those required by the statute. Second all of the evidence produced during discovery indicates that Plaintiff, who has no medical training, was not aware that the torn left hip labrum was traumatic in nature until Dr. Austin was convinced of that connection to the auto accident when he first examined her on January 26, 2012, ordered an MRI which confirmed the labral tear of the left hip, and performed a surgery on the left hip on March 5, 2012.

Consistent with the policy, State Farm was notified of the left hip connection to the auto accident in late February 2012, when the Plaintiff's mother called State Farm to advise them of the connection made by Dr. Austin in a timely manner relative to Dr. Austin's examination and findings.

Notwithstanding this information, the legal precedent, the terms of State Farm's own insurance policy language, and the opinions of Dr. Austin, State Farm maintains their position.

Moreover, State Farm through their adjuster has also admitted that notice of injury was provided by Ms. Dillon within one year. State Farm claims representative Denise Pierce, who is the person who handled the claim when the denial was made, testified that MCL 500.3145 clearly supports State Farm's position. As such, she was asked at her deposition to read Section 3145, and while doing so she injected the word "*the*" into the statute, which would be necessary in order to support State Farm's position:

"*BY MR. IACCO:*

*Q Okay. All right. Do you happen to have the 3145 handy?*

*MR. LEWIS: I don't have it. I can get it for you.*
*MR. IACCO: Why don't you do that?*
*MR. LEWIS: Whatever I can do to help.*
*(Conference off the record from 10:56 a.m. to 10:57 a.m.)*

*BY MR. IACCO:*

*Q You had mentioned in your testimony that you would have referred to 500.3145 of the No Fault Act, which is the basis of the denial in this case, before you actually denied the hip injury, left hip injury relative to the 2008 motor vehicle accident, correct?*

*A Yes.*

*Q Tell me what it is about 3415* (sic) *that you're basing that denial on?*

*MR. LEWIS: I'm just going to object on the basis of foundation.*

*BY MR. IACCO:*

*Q Why don't you just read it.*

*A Okay. It's going to be easier that way. It states, "An action for recovery of personal protection insurance benefits payable under this chapter*

*for accidental bodily injury may not be commenced later than one year after the date of the accident causing the injury unless written notice of the injury has been provided…"*

*Q Whoa. Whoa. Whoa. Back up. Where's the "the?"*

*A "causing the injury unless written notice of…" Oh. "…of injury…" Sorry. Okay. Sorry.*

*MR. LEWIS: And for the record, I'll stipulate that section - - that MCL 500.3145 says what it says. But we can keep reading.*

*THE WITNESS: Okay, "of injury as provided herein has been given to the insured within one year after the accident or unless the insured has previously made a payment of personal protection insurance benefits for the injury."*

*BY MR. IACCO:*

*Q That's good enough. All right. So I think we've established that notice of the injury was given within one year?*

*MR. LEWIS: Notice of an injury?*

*BY MR. IACCO:*

*Q Of injury was given within one year?*

*A Yes.*
(Denise Pierce – Dep. 50, 51).

In addition to the legal argument expressed in Plaintiff's letter to Jessica Wade dated November 29, 2012, along with the policy language quoted in that letter, State Farm's position is wrong because of their attempt to add words written into the statute. If MCL 500.3145 had been written with "*the*" injury as opposed to how it is written with the words "*of injury*" State Farm's position would be valid.

Michigan Court's have repeatedly held that the legislature is presumed to understand the meaning of the language it enacts into law and therefore each word of a statute is presumed to be used for a purpose. Carr v General Motors Corp, 425 Mich 313, 317 (1986); Bd of Regents of the Univ. of Michigan v Auditor General, 167 Mich 444 (1911). The Court may not assume that the legislature inadvertently made use of one word or phrase instead of another. Detroit v Redford Twp, 253 Mich 453, 456 (1931).

When the legislature enacted MCL 500.3145(1) it chose not to use the word "*the*" preceding injury when describing what the notice must include within one year of the date of accident. Instead, the legislature only required written notice "*of*" injury. The legislature has directed that all words and phrases shall be construed and understood according to the common and approved usage of the language… MCL 8.3a. There is no indication that the *"of*" preceding the word "*injury*" meant something different than the ordinary usage of those two words in MCL 500.3145(1). It is meant simply that once a claimant provides the insurance company with notice that they sustained injury arising out of a motor vehicle accident, that would satisfy the common and approved usage of the specific required notice "*of injury*" in the statute. It is appropriate to consult the lay dictionary when defining common words or phrases that have not acquired a unique meaning at law because "*The common and approved usage of a non legal term is most likely to be found in a standard dictionary and not a legal dictionary*." Horace v City of Pontiac, 456 Mich 744, 756 (1998).

The word "*the*" is defined as "*used as a function word to indicate that a following noun or noun equivalent is definite or has been previously specified by context or by circumstance.*" (Webster's International Dictionary – Merriam Webster Online [www.merriam-webster.com]).

The legislature chose not to insert "*the*" because, as defined, they did not apparently intend that a claimant be burdened with having to detail each and every injury arising out of the motor vehicle accident within one year.

Under State Farm's treatment of MCL 500.3145 requiring notice of the exact injury within one year of the accident, many claims would be denied. For example: a person complaining of shoulder pain who treats with a doctor for a number of months, goes through months of physical therapy and ultimately is referred to a specialist who, more than one year after the accident, diagnoses that it was cervical disk pathology as the cause of referred pain to the shoulder. That claim would be denied if the notice State Farm received within the first year was only of shoulder pain.

Or, if an injured person is misdiagnosed by a doctor and then correctly diagnosed but more than one year from the date of accident, that claim also would be denied because notice of "*the*" injury was not received by State Farm within the one year from date of accident.

These are not uncommon situations and there are no reported cases of other insurance companies interpreting MCL 500.3145 the way State Farm is doing it in this case. That is why there are no specific cases on point.

Interestingly, nowhere does the Defendant argue that the hip injury is not related to the accident. Rather they argue that because she didn't realize that the hip pain was a separate injury from her back injury they are not required to provide coverage. This is not in line with how the Michigan Courts have interpreted § 3145. If the legislature intended to require an individual to identify every potential injury within one year from the date of the

accident then the statue would have said so. The statute merely requires that the insurance company be notified that an injury had occurred.

As an additional layer of protection for the insurance company they can always challenge the relationship of a particular injury to the accident. There is no requirement that the notice be perfect. The insurance company just has to have enough information to trigger an investigation and make them aware that they may have exposure. Certainly anytime an insurance company has notice of a back injury they know exposure can be significant. Moreover, they know that there are things that will naturally follow some foreseeable and some not. Ultimately, though the insured still has to prove that the condition is related. If the two sides cannot agree then it would be left for a jury to decide on causation but not because notice was deficient.

**B. Defendants Argument That There Is No Written Notice Lacks Merit.**

Finally, Defendant is now arguing that the notice given was merely oral. This simply is not accurate. Initially the claim was orally reported to the agent. It is unclear whether or not the agent verbally passed the information on to State Farm or whether it was electronically imputed into the claim file. (Exhibit No. 2 of Plaintiff's COA Brief). Also, additional information was provided days later by the Plaintiff's mother in a phone conversation and that information was written into the claim file by the adjustor, Denise Pierce. (Exhibit No. 2 of Plaintiff's COA Brief). Furthermore, a letter from State Farm indicating that they had received the Plaintiff's claim was sent on September 22, 2008. (Exhibit No. 3 of Plaintiff's COA Brief). Finally, the Plaintiff provided a signed medical authorization to State Farm so that they could obtain medical records. (Exhibit No. 4 of

Plaintiff's COA Brief). The trial court found that these writings included in the claim file were sufficient to satisfy the written notice requirement.

Defendant is now for the first time directly challenging the trial court's holding. Plaintiff would argue that the published decisions of Walden, *Dozier and Lansing General* support the trial court's decision. There is no logical reason to not treat the written notes of the State Farm adjustor based on the verbal conversation with the claimant's mother as a written notice.

In *Walden* the insurance company tried to argue that notice by a claimant to an agent that was immediately and consequently embodied into written form by the agent and transmitted to the insurer was legally insufficient to satisfy the statutory requirement under 3145, *Walden* pg. 532. In finding that the notice was in compliance with 3145(1). The Court found no basis to distinguish notice by who actually transcribes the report into written form. *Id* Page 533. The main goal is to give the insurance an opportunity to investigate. There can be no serious argument that they didn't have that opportunity in this case. The Court found neither a violation of the letter or spirit of the applicable section by the agent preparing the written notice on behalf of the claimant. *Id* Page 534. The same logic holds true in this case in that there should be no difference between the adjustor, Denise Pierce, transcribing the report into written form versus one of the Dillons.

Proof that the Defendant was not seriously challenging the proposition that the insurance companies own notes could satisfy the written requirement under the statute can simply be found in it's discussion of the case in its prior brief. Never did they argue that *Walden* was wrongly decided. Rather they only argued that Walden could not be used to relieve Plaintiff from specifically identifying all her injuries within one year. (Appellants

COA brief p. 15). There is no specific discussion in their brief that the trial court committed error in relying on *Walden* in ruling that Plaintiff had complied with the written notice requirement. As argued above, to the extent the issue was raised it was given only cursory discussion by Defendant. As such this Court would be well within their discretion to treat the issue as abandoned. *Vanderwerp v. Plainfield Charter*, 278 Mich App 624, 633 (2008).

**C. The Holding Of *Jesperson v. Auto Club Insurance* Does Not Require Review.**

First and foremost, *Jesperson* is not a Notice case. Rather, *Jesperson* analyzed the payment exception found in MCL 500.3145. Defendant cites the Court's statement "either receive notice of the injury within one year or has made payment of no-fault benefits for the injury at any time before the action has commenced" in *Jesperson* page 39 Defendant concludes that the court's statement rendered an analysis regarding the phrase "notice of injury". However, no such analysis of that language was required for resolution of the issue in *Jesperson* since it was only a payment exception case. Accordingly, any language regarding the notice requirement is merely dicta. Moreover, the language relied on by the Defendant does not accurately state the actual language in the statute. Earlier in the decision when this Court was quoting the statute it cited the notice language exactly as worded without the insertion of the article "the". Id. p. 34. Arguing that this Court in *Jesperson* somehow made a finding that the notice exception in sec. 3145 required notice of every injury is a colossal leap in logic.

It is respectfully submitted, that applying the analysis used in *Jesperson* by this Court regarding the statutory interpretation would lead to the exact same result as the Court of

Appeals. Accordingly, letting the Court of Appeals published decision to stand would settle any ongoing question regarding the notice exception under MCL 500.3145.

## IV. RELIEF REQUESTED

The question in this case boils down to the legal issue of whether MCL 500.3145(1) requires notice of each and every injury within one year or, as it is written, only notice "*of injury*" within one year.

If State Farm's interpretation is allowed to become law, it would allow the no-fault insurer to avoid payment for any injury that is clearly accident related but that simply does not manifest itself within the first year. State Farm's interpretation requires prognostication of ones future condition and needs. The statute, on the other hand, only requires timely notification that an accident has occurred which involved injury. That occurred in this case.

Plaintiff's notice was sufficient under MCL 500.3145(1).

Plaintiff requests that this Court deny Defendant's Request for Leave to Appeal.

Dated: July 12, 2016

Respectfully submitted,

**GRAY, SOWLE & IACCO, P.C.**

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